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CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 172.

MARINE TRANSIT CORPORATION and Tug "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, Claimant,

Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, co-partners, doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Respondents.

BRIEF FOR RESPONDENTS

OTTO & LYON,
Proctors for Respondents,
By GEORGE V. A. MCCLOSKEY,
Counsel.

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BRIEF FOR RESPONDENTS.

Statement.

This case comes up on *certiorari* to the Circuit Court of Appeals for the Second Circuit which affirmed—with opinion reported in 49 F. (2d) 215 and appearing in the record, R. 241-246—a final decretal order in admiralty (R. 214, 215) entered upon an award of arbitrators in favor of the respondents as libellants seeking a recovery for loss of cargo in a proceeding which was commenced by filing libel in the Southern District of New York (R. 3-9) and in which an order (R. 26, 27),

subsequently resettled on consent (R. 28, 29), was entered directing that arbitration proceed.

The libel was filed *in rem* against the tug "Gerald A. Fagan"—as well as against the barge "John E. Enright" as to which latter boat proceedings were abandoned—and *in personam* against the Marine Transit Corporation, which appeared both *in personam* and as claimant, giving a stipulation for value (R. 25-A, 25-B) to release the tug. The stipulation, in accordance with the District Court rule on the subject, was conditioned that if the claimant and its stipulator should abide by all orders of the court, interlocutory or final, and pay the amount awarded by the final decree, etc., the stipulation should be void but otherwise should remain in full force and virtue (R. 25-B). The decretal order, from which the Marine Transit Corporation appealed as "claimant and respondent" (R. 227), accordingly directed that execution issue against Marine Transit Corporation and its stipulator. The stipulator never entered an order of severance and took no appeal although much of the petitioner's argument is directed to supposed rights of the stipulator.

The proceedings in the District Court were taken under authority of Section 8 of the United States Arbitration Act, which section, consistently ignored in the petitioner's brief, contemplates by its express terms the union of a proceeding *in rem*, i. e., against the vessel or upon the stipulation substituted therefor, and an arbitration proceeding, i. e., between the libellant and the claimant. Section 8 reads as follows:

> "That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel

or other property of the other party according to the usual course of admiralty proceedings, and the Court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

The full text of the Act, as it appears, unedited, in 43 Stat. at L. 883 is made an appendix to this brief.

We can not too soon set right a fundamental misconception that permeates the petitioner's brief, particularly pages 20, 21 thereof, the notion that in this case a decree *in rem* has been given in an action *in personam*. This is to ignore the facts (1) that the action is *in rem* as well as *in personam* and the ground of action, i. e., the tug's negligence, equally charges the tug *in rem* and the owner *in personam*, (2) that a stipulation for the value of the *res* was subscribed and executed by the petitioner as well as its stipulator, (3) that the subject-matter of the arbitration was the question of the tug's negligence in the performance of the owner's contract referred to in the orders directing such arbitration and (4) that the decretal order confirming the award directs payment in accordance with the stipulation for value. The case is one, therefore, which was commenced by a libel *in rem* against the tug and not merely *in personam* against the petitioner and in which a stipulation for release from seizure was given by the petitioner as claimant of the tug. It is an action instituted in accordance with the terms of Section 8. No question of a deviation from the procedure authorized by Section 8 (if constitutional) properly exists in the case. The cause of action was justiciable in admiralty apart from the arbitration agreement, i. e., the charter party clause incorporated by reference in the booking contract covering the cargo. The District Court exercised jurisdiction to direct the parties to proceed with the arbitration and, after

the arbitrators took the testimony on the issue of the tug's negligence, heard the arguments of counsel thereon and made an award of damages, the District Court entered its decretal order upon the award. As stated by the Circuit Court of Appeals (R. bottom 245, top 246):

> "The decree necessarily would be in the usual form of a decree *in rem,* against the *res* if not released, or against the claimant and stipulators, if the stipulation is substituted for the vessel. The appellant appears as respondent in the *personam* libel and as claimant in the *in rem* proceeding. This practice is common."

It should also be noted—although we contend that jurisdiction under Section 8 is not dependent upon the fact—the shipment was in fact of an international character and the contract for the transportation of the grain from Buffalo to New York was a contract involving foreign commerce as the grain was an article of foreign commerce and by the petitioner's bill of lading was declared to be "in bond for export" (R. bottom 164), i. e., covered by the petitioner's bond to the United States Government as destined to a foreign country. It is an understatement (petitioner's brief, top p. 2) to say that Dreyfus & Company received the grain in bond for export; the petitioner so carried it (bill of lading, R. bottom 164) and further recognized its international character by the proviso (R. 165): "Deliver only on surrender of original Lake Bill of Lading properly endorsed." As the Circuit Court of Appeals found regarding this cargo of grain (R. 244):

> "It was shipped to the order of the Bank of Nova Scotia from Ft. William, Ontario, and 'in bond for export,' and appellant's bill of lading provided:

'Deliver only on surrender of original Lake Bill of Lading properly endorsed.' The lake bill of lading recognized the shipment as international. The bond is given by the carrier."

The petitioner agreed to furnish the respondents as charterers insurable canal tonnage for about 200,000 bushels of wheat on the Buffalo-New York portion of an international carriage from Ft. William, Ontario for export. The booking contract (R. 147, 148) in its final clause incorporated by reference the terms of the New York Produce Exchange Canal Grain Charter Party No. 1 as amended. Such charter party (R. 149-156) concludes with an arbitration clause (R. 156) requiring disputes thereunder to be arbitrated before the Committee on Grain of the New York Produce Exchange.

Some 19,200 bushels, out of the total of 200,000, were laden upon the barge "Edward A. Ryan" which, while entering the U. S. Government lock at Troy in tow of the petitioner's tug "Gerald A. Fagan," struck the guide wall, stove in her planking and sank. All the maneuvering had to be done by the tug: the barge "John E. Enright," the second boat in the tow, was not steering (R. 91) so that she was obviously not liable and when the arbitration was ordered, all further proceedings against the barge "John E. Enright" were abandoned. Although a formal discontinuance as against the "John E. Enright" was omitted in the decretal order confirming the award, such formal discontinuance was thereafter entered (R. 235).

An order directing that arbitration proceed was entered on August 28, 1929 (R. 26, 27) and resettled on consent on September 6, 1929 (R. 28, 29) so as to conform to the terms of the memorandum decision of the District Court (Hon. ALFRED C. COXE, D. J., R. 25-I) and to substitute the words "any and all issues under the

contract" for the words "any and all disputes and controversies under the contract." The Committee on Grain, whose proceedings embrace pages 30-146 of the record, made an award that the Marine Transit Corporation pay Louis Dreyfus & Company $23,016 plus interest amounting to $1,668.66 and costs and expenses of the arbitration in the sum of $362.50 (R. 166).

Louis Dreyfus & Company moved for confirmation of the award (R. 167-174) and such confirmation was opposed upon affidavits assailing the arbitrators and asserting the application of the Harter Act (R. 175-183). Affidavits in reply were filed (R. 184-210). Hon. FRANCIS G. CAFFEY, D. J. ruled that the award should be confirmed and in his memorandum opinion said (R. 213):

> "The issues heard and decided by the arbitrators were within the terms of the order referring the matter to them, as well as within the terms of the agreement to arbitrate. I discovered nothing irregular in the proceedings."

The final decretal order now under review was thereupon entered (R. 214, 215), confirming the award, awarding judgment accordingly and directing that in default of payment within the usual period execution should issue against the Marine Transit Corporation and Continental Casualty Company, stipulator.

The grounds urged on appeal were not urged in opposition to the confirmation of the award but after the entry of the final order the petitioner procured an order requiring the libellants to show cause why they should not be restrained from recovering from the claimant or its stipulators on behalf of the tug "Gerald A. Fagan" (R. 216, 217). Affidavits were filed on both sides (R. 218, 222). Hon. FRANCIS G. CAFFEY, D. J. denied the petitioner's application and handed down an opinion as follows (R. 223, 224):

"In consequence of the proceeding being *in rem*, libellant would have been entitled to have the tug arrested and held as security for the cause of action alleged in the libel. The stipulation for value stands in the place of the tug as security and is subject to the authority of the court that would be applicable to the tug if it were now in custody (United States v. Ames, 99 U. S. 35, 36). By force of the arbitration statute (9 U. S. C., Sec. 8) the reference to arbitration of the dispute, covered by the pleadings, did not diminish or impair the jurisdiction of this court to make the same decree that it would have granted if, after trial, it had reached the same conclusion as the arbitrators. If a plenary trial had occurred, then, according to the usual practice in admiralty, the court might properly direct execution against the stipulator for enforcement of the decree (The Wanata v. Avery, 95 U. S. 600, 616). This would be in conformity with local admiralty rule 8, as well as the condition of the stipulation itself. For this purpose notice to the stipulator is not required and the decree may be entered summarily (28 U. S. C., Sec. 754; The Belgenland, 108 U. S. 153, 156; Johnson v. Chicago and Pacific Elevator Co, 119 U. S. 338, 401). It follows that inclusion in the decree on the award of the provision it contains with respect to execution against the stipulator is correct."

An order was entered accordingly (R. 225).

Nowhere in the District Court prior to the taking of the appeal was the constitutionality of the Act of Congress questioned in this case.

The Marine Transit Corporation filed assignments of error (R. 229-232) and additional assignments of error (R. 233, 234) which did not assign as error Point VIII of its brief in this Court.

POINT I.

The Arbitration Act is constitutional.

The Arbitration Act is a procedural statute and as such entirely within the competency of Congress which has power (Constitution of the United States of America, Article I, Section 8, clause 9) "to constitute tribunals inferior to the Supreme Court," *i. e.*, "such inferior courts as the Congress may from time to time ordain and establish" (Article III, Section 1) and which has power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof" (Article I, Section 8, clause 18), thereby referring to the power to establish such courts as well as to the power over interstate and foreign commerce (Article I, Section 8, clause 3) and the admiralty and maritime jurisdiction comprised in the judicial power of the nation (Article III, Section 2, clause 1). That the Arbitration Act is in effectuation of the powers so committed to Congress and conductive to the purposes for which its powers were so committed, is too plain for any argument to make it plainer and the policy expressed in the Act has received so universal an approval that it would be strange to find an opposite policy embodied and embedded in the Constitution which was adopted with a view to the distribution of constitutional power between the states and the nation and without any forecast of the argument now presented by the appellant.

In *Matter of Berkovitz* v. *Arbib & Houlberg*, 230 N. Y. 261, the New York Court of Appeals by CARDOZO, J., upholding the New York statute but applying it prospectively only, said (pp. 270, 271):

"The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies * * * Arbitration is a form of procedure whereby differences may be settled * * * * * * A promise that differences will be arbitrated is not illegal and a nullity without reference to the law in force when differences arise. Since it is directed solely to the remedy, its validity is to be measured by the public policy prevailing when a remedy is sought. In that respect, it is not different from a promise that future controversies shall be submitted to a court. The jurisdiction of the court at the time of the submission will determine whether the promise is to be rejected or enforced. This is so whether jurisdiction in the interval has been diminished or enlarged."

In the *Berkovitz* case, *supra,* the Court of Appeals considered the validity of the New York statute in its constitutional aspects and its argument is largely applicable here. The Court of Appeals held that the statute was not inconsistent with the constitutional right of trial by jury for that right is one that can be waived and was waived by the consent to arbitrate. The Court of Appeals rejected the argument that the statute abridged the general jurisdiction of the Supreme Court as continued "unimpaired" by the State constitution. The court held that in establishing a Supreme Court to administer the law, the People did not petrify the law which the court was to administer and that the Supreme Court did not lose a power inherent in its very being when it lost power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. "For the right to nullify is substituted the duty to enforce." Jurisdiction, the Court of Appeals regarded,

not as renounced but as adapted in the time and manner of its exercise to the convention of the parties. The Court of Appeals concluded (p. 276):

> "We think there is no departure from constitutional restrictions in this legislative declaration of the public policy of the state. The ancient rule, with its exceptions and refinements, was criticized by many judges as anomalous and unjust. * * * It was followed with frequent protest, in deference to early precedents. Its hold even upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do. They might have whittled it down to nothing, as was done indeed in England, by distinctions between promises that are collateral and those that are conditions * * *. No one would have suspected that in so doing they were undermining a jurisdiction which the Constitution had charged them with a duty to preserve. Not different is the effect of like changes when wrought by legislation."

In holding the New York Arbitration Law applicable without constitutional impediment to a charter party embracing an arbitration clause, this Court in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, thus stated its view of arbitration agreements in terms that anticipate the petitioner's arguments respecting the Act which Congress subsequently adopted, doubtless having that decision in view (pp. 120-123):

"The Federal courts—like those of the states and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance (*Tobey* v. *Bristol County,* 3 Story 800, 819-826; Fed. Cas. No. 14,065); or to stay proceedings on the original cause of action (Story, Eq. Jr. § 670). They have not given effect to the executory agreement as a plea in bar, except in those cases where the agreement, leaving the general question of liability to judicial decision, confines the arbitration to determining the amount payable, or to furnishing essential evidence of specific facts, and makes it a condition precedent to the cause of action. *Hamilton* v. *Liverpool & L. & G. Ins. Co.,* 136 U. S. 242, 255; 34 L. ed. 419, 423; 10 Sup. Ct. Rep. 945; *Martinsburg & P. R. Co.* v. *March,* 114 U. S. 549; 29 L. ed. 255; 5 Sup. Ct. Rep. 1035. But an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. *Hamilton* v. *Home Ins. Co.,* 137 U. S. 370, 385, 386; 34 L. ed. 708, 713; 11 Sup. Ct. Rep. 133. If executed—that is, if the award has been made—effect will be given to the award in any appropriate proceeding at law or in equity. *Karthaus* v. *Yllas Y. Ferrer,* 1 Pet. 222; 7 L. ed. 121; *Burchell* v. *Marsh,* 17 How. 344; 15 L. ed. 96; *Bayne* v. *Morris,* 1 Wall, 97; 17 L. ed. 495. And, although there is no Federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of court, be enforced in courts of the United States by any appropriate process. *Hecker* v. *Fowler,* 2 Wall. 123; 17 L. ed. 759.

In admiralty, also, agreements to submit controversies to arbitration are valid. Reference of maritime controversies to arbitration has long been common practice. *Houseman* v. *The North Carolina,* 15 Pet. 40, 45; 10 L. ed. 653, 655. The insertion in a charter party of a provision for such settlement of disputes arising thereunder was practiced, at least as early as the eighteenth century. *Thompson* v. *Charnock,* 8 T. R. 139; 101 Eng. Reprint 1310. For breach of an executory agreement a libel for damages will lie. An executory agreement may be made a rule of court. *United States* v. *Farragut,* 22 Wall. 406, 419; 22 L. ed. 879, 883; *Kleine* v. *Catara,* 2 Gall. 61; Fed. Cas. No. 7,869. An award will be given full effect. The agreement, whether executory or executed, cannot be enforced in admiralty by specific performance; merely because that court lacks the power to grant equitable relief. *The Eclipse* (*Rea* v. *The Eclipse*), 135 U. S. 599, 608; 34 L. ed. 269, 272; 10 Sup. Ct. Rep. 873. The executory agreement (perhaps in deference to the rule prevailing at law and in equity) will not be given effect as a bar to a libel on the original cause of action. The reluctance of the admiralty court to lend full aid goes, however, merely to the remedy. The substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation." (Foot-notes omitted.)

As it has been held that "the reluctance of the admiralty court to lend full aid goes, however, merely to the remedy" and that "the substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation" (*Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 123), it is not reasonable to find the Arbitration Act unconstitutional for

supplying the remedy appropriate to the recognized substantive right. In *Marchant* v. *Mead-Morrison Mfg. Co.*, 29 F. (2d) 40, (2nd C. C. A.), certiorari denied 278 U. S. 655, in directing the District Court to remand compulsory arbitration proceedings under the New York statute to the state courts, the Court said:

> "The proceeding from the outset had all the elements of a judicial controversy, to wit, adversary parties and an issue, in which the claim of one of the parties against the other, capable of pecuniary estimation, was stated and answered in the same form of pleading. All this was addressed to the Supreme Court of the state, functioning as a judicial tribunal. *Gaines* v. *Fuentes*, 92 U. S. 10; 23 L. ed. 524. The appointment of the arbitrator was but a step in the relief sought by the plaintiff from the damages inflicted by the breach of the contract."

By parity of reasoning, under the United States Arbitration Act, the appointment of arbitrators is but a step in a proceeding presenting all the elements of a judicial controversy and this is more obviously true under Section 8 of the Act, pursuant to which the proceeding is commenced by libel and seizure "according to the usual course of admiralty proceedings."

As Judge CARDOZO suggested in the *Berkovitz* case, *supra*, that in establishing a Supreme Court, the People of the State did not petrify the law, which the court was to administer, so, in conferring admiralty and maritime jurisdiction upon the United States Government the Constitution of the United States did not petrify the maritime law.

In *Atlantic Fruit Co.* v. *Red Cross Line*, 5 F. (2d) 218; 2nd C. C. A., considering the question whether the

New York statute on the subject affected recourse to admiralty and suggesting that the situation there depicted was "one that calls for remedial action," the Court said, at bottom page 219:

> "* * * It is entirely plain that this matter of arbitration, whether based on a New York statute or resting upon traditional and judge-made law, is wholly matter of remedy."

In *The Gansfjord*, 25 F. (2d) 736, 737—affirmed 32 F. (2d) 236; 5th C. C. A.—BURNS, D. J., said:

> "Certainly Congress may distribute the judicial power as its wisdom, in the light of experience, dictates, under its broad powers to regulate commerce, etc., and to ordain and establish courts inferior to the Supreme Court. If this be so, there can be no question of its rights to prescribe mere procedural forms for the enforcement of remedial legislation in the public interest."

No case questioning the constitutionality of the Act is known to us or cited by opposing counsel. Their whole argument is pervaded by the notion that the judicial power of the nation is communicated to the existing Federal courts by the Constitution of the United States. On the contrary, only the original jurisdiction of the Supreme Court is prescribed by the Constitution and even that court is of statutory organization. The inferior Federal courts have only a statutory jurisdiction and Congress may distribute to them as much or as little of the judicial power of the United States as Congress may see fit. The United States District Courts have no right to any jurisdiction which Congress has withheld and such jurisdiction as it grants must be exercised in ac-

cordance with the procedural requirements of Congressional enactment.

As this Court said in *Jackson* v. *Steamboat Magnolia*, 20 How. (61 U. S.) 296 at page 300:

> "The Constitution, in defining the powers of the courts of the United States, extends them to 'all cases of admiralty and maritime jurisdiction.' It defines how much of the judicial power shall be exercised by the Supreme Court only; and it was left to Congress to ordain and establish other courts, and to fix the boundary and extent of their respective jurisdictions. Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over all navigable waters, and all ships and vessels thereon, or over some navigable waters, and vessels of a certain description only."

In *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233, 234, this Court, referring to the provisions of the Constitution respecting the judicial power, said:

> "The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."

Nothing to the contrary was suggested in *The Mayor* v. *Cooper,* 6 Wall. (73 U. S.) 247, where this Court said (pp. 251, 252):

> "How jurisdiction shall be acquired by the inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed. The Constitution is silent upon those subjects. They are remitted without check or limitation to the wisdom of the legislature."

The construction given by this Court in *Kline* v. *Burke Construction Co.,* 260 U. S. 226 to the expressions quoted by the petitioner from *The Mayor* v. *Cooper, supra,* at page 13 of the petitioner's brief, appears from the opinion of Justice SUTHERLAND, 260 U. S. 226 at page 234:

> "The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. The Mayor v. Cooper, 6 Wall. 247, 252."

The distinction between courts which Congress creates in the distribution of the judicial power of the Federal Government and courts created in the exercise of other powers—a distinction taken in such cases as *Ex Parte Bakelite Corporation,* 279 U. S. 438 (denying a writ of prohibition to the Court of Customs Appeals established in the exercise of the power to lay and collect duties, etc.) and summarily expressed by the terms "constitutional courts" and "legislative courts"—is quite aside from the present purpose.

The cases of *United States* v. *Burlington & Henderson County Ferry Co.,* 21 Fed. 331, sustaining exceptions to

an answer to a libel of information, the libel charging carriage of an excess number of passengers and a failure to carry the required number of life-boats and life-preservers and the answer raising the question whether Congress could regulate the navigation of vessels floating on the navigable waters of the United States when engaged exclusively in the domestic commerce of the states, *Harrison* v. *Hadley,* 2 Dill. 229; Fed. Cas. No. 6137, denying jurisdiction in equity of a proceeding to contest in a United States court the title to a state office and sustaining a demurrer to the bill, *Manley* v. *Olney,* 32 Fed. 708, remanding a cause as not removable under the Acts of Congress then in force and holding that the right of a non-resident to have his case tried by a Federal court is not a constitutional right, that Congress may grant or withhold altogether jurisdiction over removal cases and that the jurisdiction which it has power to grant it has power to withdraw, do not favor the petitioner's Point II under which they are cited. *Shrauger & Johnson* v. *Phillip Bernard Co.,* 240 Fed. 131, denying an application for a temporary injunction upon an alleged independent cause of action for unfair competition in an action between residents of the same state, and *In re Hollins,* 229 Fed. 349 (2nd C. C. A.), holding that the District Court, sitting in bankruptcy, had no jurisdiction to entertain certain proceedings instituted after the court made an order confirming an offer of composition, thereby taking the estate out of the bankruptcy court, are remote from any subject here involved.

The petitioner cites *Farrell* v. *Waterman S. S. Co.,* 291 Fed. 604, enlarging upon the opinion of the same judge in 286 Fed. 284. The point decided was the invalidity of the Act of June 10, 1922, c. 216; 48 Stat. at L. 634, which the following year was held unconstitutional by this Court in *State of Washington* v. *W. C. Dawson & Co.,* 264 U. S. 219. The ground of decision in this Court

was that the Act (purporting to reserve to compensation claimants, other than the master or members of the crew of a vessel, their rights and remedies under workmen's compensation laws and rendering such rights and remedies exclusive of any remedy in admiralty) was unconstitutional as an attempt to delegate to the several States the legislative power of Congress and as subjecting to conflicting State legislation a subject which the Constitution had designed for uniform regulation. In the opinion of Judge ERVIN, in 291 Fed. 604, much was said that finds no recognition in the decisions of this Court and at the bottom of page 611 the District Court even asserted that the opinion of this Court in *Kline* v. *Burke Construction Co.*, 260 U. S. 226, was in conflict with the reasoning of *Knickerbocker* v. *Stewart*, 253 U. S. 149 and *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205—an entirely inadmissible supposition. It was State legislation that was held invalid in its application to a longshoreman killed on navigable waters in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 and it was State legislation under purported authority of an Act of Congress (Act of October 6, 1917, c. 97, 40 Stat. at L. 395) that was held invalid in its application to a case arising out of the drowning of a bargeman in navigable waters in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149. In the former case a State workmen's compensation law was deemed an infringement of the uniformity necessary to the maritime law. In the latter case the same consideration governed with the further ruling that such infringement may not be authorized by Congress in the exercise of a power conferred by the Constitution to preserve the uniformity of the maritime law. Whatever withdrawal of federal court jurisdiction may have been involved in *Knickerbocker Ice Co.* v. *Stewart*, *supra*, and *State of Washington* v. *W. C. Dawson & Co.*, *supra*, was incidental to the purpose of enabling State legis-

lation to invade the maritime law and the incident fell with the major purpose. The provisions made in the Act of June 10, 1922, to authorize compensation remedies before State tribunals and to withdraw admiralty jurisdiction in such cases from the United States District Court were so conjoined and so correlative that the jurisdiction could not well have been intended to be withdrawn when the substituted remedy, for constitutional reasons, proved unavailable. What was furthest from the intention of Congress was that the worker should fall between two stools, between a jurisdiction effectively withdrawn and a remedy ineffectively offered. This Court dealt with the subject as a conflict between State and national jurisdiction to legislate. In *Kline* v. *Burke Construction Co., supra,* no question of the scope of the legislative power of state and nation was involved. This Court had before it the question whether the pendency of an action at law in the United States District Court, the jurisdiction of which rested upon the ground of diversity of citizenship, authorized the issuance of an injunction restraining the prosecution by the defendant in such action at law of an equity proceeding against the plaintiff in the action at law and such plaintiff's sureties, both actions being *in personam* and presenting substantially the same issues but with the addition of the sureties as parties defendant in the equity suit. This Court held that the party suing in the Federal courts had no constitutional right to such restraint of the State court action and in that connection use the expressions above quoted.

The Circuit Court of Appeals in the case at bar was abundantly sustained by authority in ruling (R. 243):

> "Inferior federal courts have only statutory jurisdiction, and Congress may grant as much or little of the judicial power as it will. It has been long

settled that the district courts have only such right to jurisdiction as Congress grants, and it may withhold jurisdiction in accordance with the procedural requirements of Congressional enactment."

The Act, so far from depriving the district courts of jurisdiction—for all their jurisdiction, as we have seen, is purely statutory, not by constitutional grant—has enlarged their jurisdiction to embrace the enforcement of arbitration agreements, not only by ordering such arbitration to proceed but by entering decree upon the award. The award of arbitrators has been given effect, without aid of statute, where the parties voluntarily proceeded with the arbitration. In requiring an unwilling party, by force of the statute, to proceed with the arbitration, the court gives essentially the same effect to the award when rendered. If an arbitrator, though chosen by the parties prior to controversy, is a constitutional stumbling-block, we wonder how special commissioners in admiralty have been so much in use since the organization of the Government under the Constitution. The petitioner's argument is as applicable to the one as to the other. Even the merits of a cause may by consent of parties, though not otherwise save in exceptional conditions as in *The P. R. R. No. 35*, 48 F. (2d) 122, be referred to a commissioner (*The Bronx*, 246 Fed. 809, 2nd C. C. A.; *Luckenbach* v. *Delaware, Lackawanna & Western R. Co.*, 168 Fed. 560) and it is precisely such consent that supports a reference to arbitrators.

The petitioner's suggestion that the Arbitration Act gives judicial power to laymen curiously ignores the historical fact that laymen, in the form of a jury, have long had their part in the functioning of the courts and the use of a jury in admiralty in certain Great Lakes cases is provided for by Revised Statutes Section 566, now embodied in the United States Code, Title 28, Sec-

tion 770. The petitioner itself declares a board of arbitrators "very similar to a jury" (petitioner's brief, p. 30). The distinction between lawyers and laymen is certainly not embedded in the Constitution and in fact we know of no Act of Congress requiring district judges to be lawyers.

In *The Hardware Dealers Mutual Fire Ins. Co. of Wisconsin* v. *The Glidden Co.*, decided by this Court November 23, 1931 (not yet reported) and sustaining a Minnesota statute requiring the insurer to incorporate in its policy standard form arbitration provisions which had the effect of making the decision of the arbitrators determinative of the amount of loss, this Court said:

> "Granted, as we now hold, that the State, in the present circumstances, has power to prescribe a summary method of ascertaining the amount of loss, the requirements of the Fourteenth Amendment, so far as now invoked, are satisfied if the substitute remedy is substantial and efficient, see Crane v. Hahlo, 258 U. S. 142, 147. We can not say that the determination by arbitrators, chosen as provided by the present statute, of the single issue of the amount of loss under a fire insurance policy, reserving all other issues for trial in court, does not afford such a remedy, or that in this respect it falls short of due process, more than the provisions of State workmen's compensation laws for establishing the amount of compensation by a commission. New York Central R. R. Co. v. White, 243 U. S. 188, 207-208; Mountain Timber Co. v. Washington, 243 U. S. 219, 235; or the appraisal by a commissioner of the value of property taken or destroyed by the public made controlling by condemnation statutes, Dohany v. Rogers, 281 U. S. 362, 369; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 695; Crane v.

Hahlo, supra, p. 147; or findings of fact by boards or commissions which, by various statutes, are made conclusive upon the courts if supported by evidence, Tagg Bros. & Moorhead v. United States, 280 U. S. 420; I. C. C. v. Union Pacific R. R. Co., 222 U. S. 541; Virginian Ry. Co. v. United States, 272 U. S. 658, 663; Silberschein v. United States, 266 U. S. 221; MaKing Products Co. v. Blair, 271 U. S. 479."

In the course of its opinion in *The Hardware Dealers Mutual Fire Ins. Co. case* this Court noted:

"This type of arbitration clause has long been commonly used in fire insurance policies, both in Minnesota and elsewhere, and, when voluntarily placed in the insurance contract, compliance with its provisions has been held to be a condition precedent to an action on the policy. Gasser v. Sun Fire Office, 42 Minn. 315; Hamilton v. Liverpool, London & Globe Ins. Co., 136 U. S. 242; Scott v. Avery, 5 House of Lords 811, 854; see Red Cross Line v. Atlantic Fruit Co., 264 U. S. 190, 121."

The arbitration clause in the case at bar does not owe its origin to statutory compulsion but to the voluntary and unforced action of the parties. The petitioner is therefore unable to maintain that its constitutional rights have been violated and is driven to contend that the constitutional rights of the courts have been invaded and to sustain that contention by an appeal to the outworn prejudice of another age.

POINT II.

Congress in enacting an Arbitration Act had the constitutional competency to confer upon the district court sitting in admiralty, the procedural power to require specific performance of arbitration agreements affecting causes within its jurisdiction.

The petitioner's argument in favor of the contrary proposition disregards the analogies of our legislative history and confuses two things essentially distinct—jurisdiction over the subject-matter, in respect of which the maritime jurisdiction may not be extended to non-maritime heads, and procedural jurisdiction which may be extended by act of Congress as incident to any maritime subject-matter.

The Constitution (Article III, Section 2) prescribes: "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction." The subject-matter is thus of constitutional prevision. Neither the substantive law to be applied nor the procedure to enforce it is indicated by the Constitution which conveys to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof" (Article I, Section 8, Clause 18).

As this Court said in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215:

> "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

It is in the exercise of that power that Congress enacted the Limited Liability Act which gave to the courts

the power, certainly of a maritime nature if not previously exercised in the American admiralty, to entertain proceedings for the limitation of the liability of ship owners. Such a proceeding is an independent head of jurisdiction without regard to whether the claims limited against are such as might have been sued upon in the admiralty or not.

The No. 6, 241 Fed. 69, 71 (2nd C. C. A.).

It was in the exercise of that paramount power that Congress enacted the Ship Mortgage Act, 1920 (Act of June 5, 1920, c. 250, 41 Stat. at L. 988), the validity of which was at least assumed in *The Northern Star,* 271 U. S. 552, as it had been assumed in advance in *Bogart* v. *The Steamboat John Jay,* 17 How. (58 U. S.) 399, at page 402, where this Court, after adverting to the English Act giving the admiralty courts an enlarged cognizance of mortgages of ships, said:

> "Until that shall be done in the United States, by Congress, the rule, in this particular, must continue in the admiralty courts of the United States, as it has been."

Now, we do not contend that Congress may enlarge the maritime jurisdiction to embrace subjects without maritime relation but certainly, where such relation exists, Congress may create a statutory jurisdiction not previously in use and in doing so may authorize appropriate remedies, though otherwise unknown to admiralty practice. So in a limitation of liability proceeding, under the Acts of Congress, the admiralty court "in working out its jurisdiction acquired the right to marshall all claims, whether of strictly admiralty origin or not" and further has power "to do what is exceptional

in a court of admiralty—to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court" (*Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 217, 218).

The procedure in limitation proceedings is so far of an equitable character as regards the injunctive relief afforded, the avoidance of a multiplicity of suits, the drawing of all parties into concourse and the distribution of the fund that in *Norwich Company* v. *Wright*, 13 Wall. (80 U. S.) 104, in holding that the court of admiralty was the appropriate court for such proceedings, this Court said at page 123:

> "Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not."

Before the Limited Liability Act was passed the power to grant injunctive relief was as foreign to admiralty procedure as the power to grant specific performance of a contract before the enactment of the Arbitration Act. The power to grant such injunctive relief in proceedings for the limitation of a ship owner's liability is not more necessarily incident to the entertainment of such proceedings than the power to enforce specific performance of an arbitration agreement in proceedings under the Arbitration Act. There is no consistent constitutional principle which can at the same time sustain the granting of injunctive power in limitation proceedings and yet strike down the power to compel specific performance in the case at bar. In *The Eclipse*, 135 U. S. 599, as stated by this Court at the bottom of page 608: "There was nothing maritime about the claims of the interveners, and the intervention was properly dismissed for want of jurisdiction over the sub-

ject-matter." The Arbitration Act, in its relation to the present case, deals with a case where, in the language of the Act itself, the basis of jurisdiction is a cause of action otherwise justiciable in admiralty. The libel charges the tug and carrier with the loss of cargo on a chartered barge. The subject-matter is of immemorial cognizance in the admiralty. All that is new is that the claimant is to be held to its own voluntary agreement to arbitrate the controversy. It is not the inherent power of the court that is involved, but the power of Congress to grant a remedy in aid of a jurisdiction always exercised in the admiralty. No extension of the subject-matter of admiralty jurisdiction is in question. What is questioned is the power of Congress to adapt the procedure of the court to the legislative purpose.

The petitioner under Point II of its brief asserts that the Act of Congress deprives the courts of judicial power but under Point III alleges that the Act enlarges that power beyond constitutional bounds. Such an argument is self-destructive.

POINT III.

The Act should be construed with a view to effectuating its purposes.

The petitioner's challenge to the validity of the Act is scarcely more hostile to it than its other points which all tend to narrow the scope of the Act, to embarrass procedure under it and to render it as little efficacious as possible, in short, a mere trap of technicalities for those who may rely upon it. The Act should on the contrary be construed in furtherance of its purpose and, as remedial legislation, with a view to facilitating the use of arbitration. The Act was responsive to general

public demand from the commercial interests of the country and it would be unbecoming for the courts to assume that Congress intended rather to disappoint and defeat the expectations of the commercial community than to give them effect.

We may say of the United States Arbitration Act what this Court has said of the Limited Liability Act in *Providence & New York S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 588, 589, 590:

> "In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. * * *
>
> We have said that, by the provisions of the act, the scheme was sketched in outline. A reference to its provisions shows that it was only in outline; and that the regulation of details as to the form and modes of proceeding was left to be prescribed by judicial authority. The law was evidently drawn in view of similar laws adopted and in operation in England and in some of the States. It laid down

a few general principles and propositions, and left it to the courts to enforce them and carry them into practical effect."

The court should construe the United States Arbitration Act in a similar spirit instead of seeking to clip the wings of the statute.

POINT IV.

The action was in rem within Section 8, which the Courts below have properly construed.

Two arresting statements appear at the head of petitioner's Point IV, i. e. that the court below held that the provisions of Section 8 of the Act are independent of the other sections of the Act and that Section 8 of the Act has no application to this case. Examination of the opinion of the Circuit Court of Appeals fails to show any statement by that court regarding Section 8 as "independent of the other sections of the Act" but does show that Section 8 has direct application to the case.

We certainly do contend, as the Circuit Court of Appeals by implication held, that Section 8 is in no respect qualified by Section 9 which relates to a different subject-matter as will be argued under Point V of our brief in opposition to Point V of the petitioner's brief. That the provisions of Section 8 are applicable where, to quote its terms, the basis of jurisdiction is a cause of action otherwise justiciable in admiralty, without regard to any limitation on the generality of those terms that may be suggested by arguments from other portions of the act or, again to use its language, "notwithstanding anything herein to the contrary", will be argued under Point VI of this brief in opposition to the petitioner's Point VI.

The Act is to our mind a code embracing various aspects of a large subject involving foreign and interstate

commerce as dealt with in actions at law and suits in equity, also such causes of action as are justiciable in admiralty and the use of proceedings *in rem* in connection with the enforcement of arbitration agreements, stay of suits brought in disregard of such agreements, the determination whether an agreement for arbitration was made, the enforcement of such agreement if made, the enforcement of the award in cases where proceedings to compel performance of the agreement are required and the enforcement of the award where the parties have proceeded with the arbitration without such compulsion, the appointment, procedure and power of arbitrators, the confirmation, vacation, modification or correction of awards, etc. Some provisions of the Act apply to one subject, some to another and to apply every part of the Act to each subject to which any part of it refers is the surest way to make the whole unworkable.

The case of *Zip Mfg. Co.* v. *Pep Mfg. Co.*, 44 F (2d) 184, involved no question presented here. The case cited was a patent infringement case in which the defendant moved for a stay pending arbitration of the issues under Section 3 of the United States Arbitration Act. Such stay was denied upon the ground that the subject-matter was not within the coverage of the Act. It may be noted that the arbitration agreement itself provided for arbitration in accordance with the New York Statutes. The suggestion in the opinion that the Act should be treated as a connected whole and its parts harmonized gives no countenance to a confusion of provisions looking to varying situations within the general scope of the Act.

The petitioner's statement that Section 8 has no application to this case overlooks the fact that the action was *in rem*, that the proceedings conformed to Section 8 of the Act and that it is the very design of that section to combine an arbitration proceeding, necessarily between personal parties, and a remedy *in rem* flowing from the

matters so determined. With such a provision lacking, the Act would be very inadequate for its purpose, as a written agreement of arbitration between a vessel, as such, and a cargo owner is quite unknown.

The libel is *in rem* against the tug "Gerald A. Fagan" as well as *in personam* against Marine Transit Corporation. The Marine Transit Corporation appears in the case both as respondent (being sued *in personam*) and as claimant (having claimed the tug). It is too late to raise on appeal the question, not raised in the District Court, whether such joinder, common enough in practice, is authorized by the rules.

Merritt & Chapman Derrick & Wrecking Co. v. *Chubb,* 113 Fed. 173, 176 (2nd C. C. A.).

The libel announces "a cause of contract, collision and cargo damage" (R. 3), counts upon a booking contract (R. 5) and sets forth the circumstances of the loss (R. 5, 6). The barge "John E. Enright" was joined as owned and operated by the Marine Transit Corporation which, the libel states (R. bottom 3), "owns and/or charters and operates a number of such barges, of which the barge "John E. Enright" is one and Diesel tugs of which the "Gerald A. Fagan" is one. It turned out, however, that the "John E. Enright" was not steering and, although she was operating under charter to the Marine Transit Corporation, the proceedings against her were abandoned. The libel presents, in reference to the petitioner and its tug "Gerald A. Fagan", a very usual statement of a contract of carriage and loss of cargo by its breach.

The "Gerald A. Fagan" was so manifestly the instrument employed by the petitioner in the performance of its contract of transportation that in the lower courts the petitioner claimed the benefit of the Harter Act under *Sacramento Nav. Co.* v. *Salz,* 273 U. S. 326. The appli-

cation of the Harter Act is precluded by the fact that the charter party adopted a rule of liability very different from the Harter Act (R. bottom 153) and, the Circuit Court of Appeals having so held (R. 244), the petitioner has not claimed in this Court the benefit of the Harter Act. The fact that it did so below, however, suffices to demonstrate that the tug was furnished in execution of the transportation contract and, in effect, as part of the carrying vessel.

In admiralty it is immaterial whether the libel against a carrier sounds in tort or in contract.

> *California-Atlantic SS. Co.* v. *Central Door & Lumber Co.*, 206 Fed. 5, 7 (9th C. C. A.);
> *Rainey* v. *New York & P. S. S. Co., Ltd.*, 216 Fed. 449, bottom p. 452 (9th C. C. A.).

See *Dampskibs Aktieselskabet Thor* v. *Tropical Fruit Co.*, 281 Fed. 740, 742.

The petitioner's real quarrel is with the scheme of the Act itself which in Section 8 designs to combine an arbitration proceeding with a proceeding *in rem*. Such arbitration is necessarily between the libellant and the claimant, if the owner claims, or, if the master should claim, between the libellant and the claimant's principal. The procedure followed below was in strict conformity with Section 8 which authorizes libel and seizure, *i. e.*, a proceeding *in rem*, direction that the parties, *i. e.*, the libellant and the claimant, proceed with the arbitration, and entry of decree upon the award. Such decree would in any case run against the *res* if not released or against claimant and stipulators if a stipulation be substituted for the vessel as in the case at bar.

The petitioner's entire argument on the subject ignores the fact that the Marine Transit Corporation was claimant as well as respondent, that the liability *in rem*

arose out of its personal contract and was the same liability whether enforced against the Marine Transit Corporation or against the *res* or against the stipulator. The liability was essentially the same whether enforced against the carrier *in personam* or against the vessel *in rem;* the difference is but one of process and procedure.

> *The Steamer "St. Lawrence",* 1 Black (66 U. S.) 522 top p. 529.

See also our argument under Point VII of this brief.

POINT V.

Sections 4 and 8 of the Act, authorizing suit to enforce a violated agreement to arbitrate, are independent of Section 9 which relates, not to proceedings to compel the arbitration, but to proceedings instituted after award.

Section 9 contemplates cases where the first application to the court is to confirm the award, the arbitration not having been refused but carried out. Hence it is that Section 9 makes provision for determining in what court the application should be made. Such provision would be unnecessary in the case of an action already pending and brought in accordance with the provisions of Section 4, whether at law, in equity or in admiralty. The provisions regarding notice of the application, *e. g.* that upon service thereof on the adverse party the court shall have jurisdiction of such party as though he had appeared generally in the proceeding, are entirely unsuitable to proceedings to compel arbitration in which cases Section 4 makes provision for the district of suit and the manner of service, to which Section 8 adds the special provisions applicable to proceedings *in rem.*

Where the proceeding is to compel arbitration, the district of suit is provided for by the statute in Section 4. Where the proceeding is to confirm an award after arbitration had without proceedings to compel it, the district in which application for confirmation shall be made may be specified by agreement of the parties, or, failing such designation, is declared to be "the district within which such award was made." Evidently the proceedings begin with the award and are concerned only with its enforcement. Section 9 provides for so special a case and is so little a qualification upon the Act as a whole that no other section of the Act refers to Section 9.

Section 4, governing proceedings to compel arbitration, gives jurisdiction thereof to "any court of the United States which, save for such agreement, would have jurisdiction under the Judicial Code at law, in equity or in admiralty of a suit arising out of the controversy between the parties" which, of course, imposes upon such jurisdiction the usual qualifications as to residence—except indeed in proceedings *in rem* to which residence is immaterial and for which provision is made in Section 8 "according to the usual course of admiralty proceedings." Section 9 relaxes the requirements as to residence in personal actions in cases where an award has been made under an arbitration agreement providing that a judgment of the court shall be entered upon the award whether specifying the court or not as the case may be and whether the adverse party be resident within the jurisdiction or not. Such differences in procedure are irreconcilable with identity of subject-matter.

Section 8, addressing itself to cases where "the basis of jurisdiction" is "a cause of action otherwise justiciable in admiralty," indicates the special character and independent efficacy of its provisions by the express language "notwithstanding anything herein to the contrary."

It is these words which the petitioner seeks in effect to delete by confining the application of Section 8 to cases within Section 9, which has a different comprehension and makes no reference to the subject-matter of Section 8. Both Section 8 and Section 9 begin with "if" but the presupposition to the application of Section 8 is "if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty"—in which case the court may entertain the libel, issue process and proceed to decree —whereas the hypothesis that authorizes the application of Section 9 is "if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award," etc. Section 8 contains no reference to Section 9 but independently provides that the court "shall retain jurisdiction to enter its decree upon the award." Any supposition of the interdependency of that provision and of the provisions of Section 9 respecting the confirmation of awards is repelled by the emphatic language of Section 8—"notwithstanding anything herein to the contrary." The argument that Section 8 is conditioned by Section 9 disregards the language of Section 8 and assumes that the object of the Act is to impede and defeat its own application.

It is a fictitious difficulty that the petitioner raises in charging that according to the theory of the court below a decree could be entered in admiralty when a judgment could not have been entered in an action at law. No such difficulty exists, for Section 9 has no reference to an action for specific performance of an agreement to arbitrate, whether such action is brought at law or in admiralty, but contemplates the entry of judgment without action, the parties having voluntarily gone to arbitration under an agreement providing for the entry of judgment upon the award. So understood, Section 9 has its natural place in the scheme of the Act. If, however, Section 9 is to be interpreted as meaning

that every agreement for arbitration shall be nugatory unless containing a specific provision that judgment may be entered upon the award, that should have been said at the outset of the Act, not reserved for the ninth section. The petitioner's contention would deprive the Act of a great part of its efficacy, render it little responsive to the commercial demand that called it into being and make its whole operation dependent upon form.

POINT VI.

The shipment was in fact an international shipment and in any event the Act is applicable in this litigation.

It is not denied that the grain in question here was an article of foreign commerce and that its intrastate movement was only a part of and in aid of its transit in the channels of international trade. Obviously the contract was one "evidencing a transaction *involving* commerce" (Section 2 of the Act) in the limited sense of foreign and interstate commerce (Section 1) and the maritime transaction embraced both a charter party (R. 148) and a bill of lading (R. 163-165) even if Section 8 is to be qualified by Sections 1 and 2 in the face of the language "notwithstanding anything herein to the contrary" by which Section 8 declares itself a separate fountainhead of jurisdiction.

The terms "a contract evidencing a transaction involving commerce" (Section 2) are much broader than a transaction constituting such commerce. It is sufficient that commerce of a foreign or interstate character is involved, *i. e.*, affected, implicated, connected. Foreign commerce is certainly involved even in the intrastate conveyance of an article making by several stages its transit from a foreign country, through this country,

and beyond. There is no reason to suppose that Congress intended to exert less than its full authority over the subject. As this Court said in *The Minnesota Rate Cases*, 230 U. S. 352, 399:

> "The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

So in *Houston, E. & W. Texas Ry. Co.* v. *United States* (The Shreveport case), 234 U. S. 342, at pages 351, 352, this Court said:

> "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

See also *Wisconsin R. R. Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 589, 590.

In *B. & O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, this Court held that whether a shipment of goods is interstate and therefore subject to the rates provided by the carrier's interstate tariff depends upon the essential character of the movement and that character is not necessarily determined by the contract between shipper and carrier. As this Court said (p. 171):

> "For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment."

If that conclusion is possible where the question is merely one of the application of interstate or intrastate rates, *a fortiori,* where the question relates to the application of an Act of Congress governing interstate and foreign commerce and such Act expressly by its own terms affects contracts evidencing transactions involving such commerce—terms expressive of the most indirect as well as of the most immediate relation—there should be no hesitancy in giving the Act appropriate force.

The non-negotiable bill of lading issued by the petitioner recites as a fact—and necessarily as a fact of which the petitioner had notice—that the grain, which was shipped to the order of the Bank of Nova Scotia (R. 164), was "From Ft. William, Ont." and "IN BOND FOR EXPORT" (R. 164, last line) and in consequence the petitioner's bill of lading further provides: "Deliver only on surrender of original Lake Bill of Lading properly endorsed" (R. 165). Thus, the lake bill of lading became a necessary document of title under the canal bill of lading and the continuous movement of the shipment in international commerce was recognized. The bond in such case is given by the carrier under Section

551 of the Act of September 21, 1922, 42 Stat. at L. 975, made Section 451 of Title 19 of the United States Code and subsequently repealed (only to be reënacted in the Tariff Act of June 17, 1930), reading as follows:

> "451. Carriers of bonded merchandise; designation; bond.—Any common carrier of merchandise owning or operating railroad, steamship, or other transportation lines or routes for the transportation of merchandise in the United States, upon application and the filing of a bond in a form and penalty and with such sureties as may be approved by the Secretary of the Treasury, may be designated as a carrier of bonded merchandise for the final release of which from customs custody a permit has not been issued."

Section 453 of Title 19 of the United States Code further provided:

> "453. Merchandise and baggage which may be transported in bond for exportation; regulations.—Any merchandise, other than explosives and merchandise the importation of which is prohibited, shown by the manifest, bill of lading, shipping receipt, or other document to be destined to a foreign country, may be entered for transportation in bond through the United States by a bonded carrier without appraisement or the payment of duties and exported under such regulations as the Secretary of the Treasury shall prescribe, and any baggage or personal effects not containing merchandise the importation of which is prohibited arriving in the United States destined to a foreign country may, upon the request of the owner or carrier having the same in possession for transportation,

be entered for transportation in bond through the United States by a bonded carrier without appraisement or the payment of duty, under such regulations as the Secretary of the Treasury may prescribe."

Thus, not only was the shipment in international commerce but the carrier gave bond that it should maintain that character which it does not now lie in the carrier's mouth to deny.

The international character of the shipment may exclude the necessity of arguing the coverage of the Act but we submit that Section 8 contemplates as "the basis of jurisdiction" an admiralty cause of action involving libel and seizure, declares such basis of jurisdiction to be independent of the other provisions of the Act, "notwithstanding anything herein to the contrary", and contains neither the word "commerce" nor the words "maritime transactions" previously defined. As the Circuit Court of Appeals noted (R. 245): "Sections 4 and 8, which permit applications to the court, make no reference to these terms." The significance is that litigation involves a basis of jurisdiction not requiring restatement in the Act and in making agreements to arbitrate enforcible, the Act contemplated an enforcibility as broad as the jurisdiction of the Federal courts. No such imperfect result as making the agreement enforcible in certain classes of litigation and not in others of which the Federal courts have cognizance could be intended.

Since Section 4 allows a petition in any court of the United States which, save for the arbitration agreement, would have jurisdiction under the Judicial Code at law, in equity or in admiralty of the subject-matter of a suit arising out of the controversy between the parties and since such jurisdiction extends beyond the terms "mari-

time transactions" as defined by Section 1 with reference to foreign commerce and "commerce" as defined by Section 1 with reference to foreign and interstate commerce, it is apparent that the application of the Act in litigation is as wide as the jurisdiction of the court and is not confined to cases within the terms "maritime transactions" and "commerce" as defined in Section 1. The right to petition a court of the United States to enforce an arbitration agreement is defined in terms of the court's jurisdiction, not in the terms employed in Section 1. The solution cannot be that the jurisdiction is to be confined by implication to terms not mentioned in connection with it and repugnant to the terms in which that jurisdiction is expressed. The solution must be that the sections of the Act relating to litigation are independent of Sections 1 and 2 of the Act and that these sections, within their limits, give validity elsewhere to arbitration agreements not litigated in the Federal courts.

The foregoing construction gives consistent meaning to the Act and finds in it a consistent policy. Any other construction leads to impossible results. If the "maritime transactions", including collisions, contemplated by Section 1, are confined to foreign commerce, is it to be supposed that Congress contemplated that an arbitration agreement affecting a collision in interstate commerce should not be enforced by a petition under Section 4 of the Act or under Section 8 thereof? What reason for such a policy could be imagined? Is it not to impute folly to Congress to suppose that an arbitration agreement affecting transatlantic liners shall be treated as valid but an arbitration agreement affecting coastwise steamers shall be unenforcible? Is it not equally impossible to comprehend the policy that would deny effect in an admiralty court to an arbitration agreement affecting a ship plying between ports of

the same state while giving effect to a similar agreement involving a ship plying between ports of different states? Out of what witch's pot can such confusion come? Is it not, however, a mere restatement of the terms of the Act to say that wherever a court of the United States would have jurisdiction under the judicial Code at law, in equity or in admiralty of the subject-matter of a suit arising out of the controversy between the parties it may direct that arbitration proceed under a written agreement therefor and that where the basis of jurisdiction is a cause of action otherwise justiciable in admiralty, then, "notwithstanding anything herein to the contrary", the court, after libel filed and seizure made, has jurisdiction to direct the parties to proceed with the arbitration and retains jurisdiction to enter its decree upon the award?

"The party claiming to be aggrieved" under Section 8 is, of course, "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration", as said in Section 4, and nothing in either section confines such "written agreement for arbitration" to agreements involving "maritime transactions" in the limited sense defined in Section 1 with reference to foreign commerce as distinguished from any subject-matter of which a court of admiralty would have jurisdiction under the Judicial Code in the terms of Section 4 or which, apart from the arbitration agreement, would be justiciable in admiralty in the terms of Section 8.

The suggested construction seems conformable to the explanations of the Act given at the time of its passage, for the House report (No. 96, 68th Congress, 1st session), said:

> "The purpose of this bill is to make valid and enforcible agreements for arbitration contained in con-

tracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in Federal courts."

See also The Congressional Record of February 4, 1925 (Vol. 66, part 3, p. 3004, *i. e.*, 68th Congress, 2d session, Jan. 20-Feb. 7, 1925).

POINT VII.

Decree, with direction for issuance of execution, was properly entered against the petitioner and its stipulator.

Henry on the Jurisdiction and Procedure of the Admiralty Courts of the United States says (pp. 343, 344):

> "The stipulator is a surety for the claimant, who by entering into the bond becomes individually liable in that cause of action in which he makes claim. Such personal liability does not necessarily arise from the actual ownership by the claimant of the vessel which incurs a maritime lien, as where the whole vessel is chartered to another who sails and provides the funds, or to the master who sails the vessel on shares. The claimant may be master, owner or a foreign consul and the stipulators are the sureties of the claimant who becomes a principal by entering into the stipulation. * * *
>
> The act of 1847 (Rev. Stat. §941), permitting a bond with sureties to be taken by the marshal, provides that the court may enter a decree, and award execution at the same time against the principal and his sureties on the bond given for the release. The same power exists as to stipulation taken by

> the court on the release of the vessel to the claimant."

As stated by the Circuit Court of Appeals for the Ninth Circuit in *Perriam* v. *Pacific Coast Co.*, 133 Fed. 140, near top page 144:

> "This has always been held to mean that the entry of judgment against the stipulators is a matter of course, and that the stipulators have rendered themselves subject to such entry of judgment by the bare fact that they have so stipulated."

The petitioner's statement that "the principal of the stipulator was the tug 'Fagan'" (petitioner's brief, p. 27) is opposed to the very nature of the stipulation as a release of the tug and the substitution of the obligation of the stipulation therefor.

The libel was maintainable in rem and the stipulation was given as a substitute for the vessel so that the stipulation was liable to the exercise of every authority on the part of the court which it could properly exercise if the thing itself was still in the custody of the court.

The Wanata, 95 U. S. 600 at page 611;
The Palmyra, 12 Wheat. (25 U. S.) 1.

Stipulations are to be interpreted as to the extent and limitation of responsibility created by them by the intention of the court which required them, and not by the intention of the parties who are bound by them.

The Beaconsfield, 158 U. S. 303, top page 311.

As the Circuit Court of Appeals for the Fourth Circuit said in *The Glide,* 72 Fed. 200, 202, 203:

> "In other words, the sureties, in great measure, stand in the position of bail to the action. They are not parties to the cause. They are represented by the claimant; they covenant to pay such decree as may be made against him; and the decree against him binds them."

As the Circuit Court of Appeals for the Sixth Circuit said in *The New York,* 104 Fed. 561, 564, in opinion by Judge, later Justice, LURTON:

> "Such a bond is not a mere personal security given to the plaintiff, but a security given to the court. It is 'a pledge or substitute for the property proceeded against' * * *."

The case of *Atlantic Mut. Ins. Co.* v. *Alexandre,* 16 Fed. 279, ADDISON BROWN, D. J., the petitioner's sole citation on this point, is not authority for the petitioner but against it. In that case a former action *in rem* was held not to be technically a bar against a subsequent proceeding *in personam* where the stipulation in the former cause was signed by only one of several claimants made respondents in the second suit. The other claimants did not, in their character as such merely, become personally responsible for the decree *in rem,* not having signed the stipulation. In the case at bar the sole claimant of the tug "Gerald A. Fagan" did sign the stipulation and the language of Judge BROWN (p. 281) in reference to the distinction is fatal to the petitioner's argument, for Judge BROWN said:

> "In the present case the claimants in the former suit are identical with the respondents in the latter, and if all the claimants in the suit *in rem* had executed the stipulation for the whole amount of the

demand, the remedies available in the former action would thence forward seem to be coextensive with any obtainable in an action *in personam;* * * *."

The stipulator's agreement is wholly misconceived in the statement appearing on page 28 of the petitioner's brief: "It agreed to pay only in the event of a final decree against the tug 'Fagan' and there has been none." The agreement of the stipulator as expressed in the stipulation for value was not that if a decree were rendered primarily against the tug the stipulator should be secondarily liable but on the contrary the stipulation recited (R. 25 A): "the parties hereto consenting and agreeing that if the libelant recover, the decree may be entered against them and each of them", etc. That is precisely the character of the decree entered. The decree, therefore, conforms to the stipulation itself, which further provides (R. bottom 25 A, top 25 B): "that thereupon execution therefor may issue against their and each of their goods, chattels, lands and tenements or other real estate."

The petitioner's argument seems to be directed to a case that does not exist upon this record. By the express terms of the stipulation the signatories thereto—the petitioner and its stipulator—assumed a direct personal obligation, not a secondary liability upon the default of another. Instead of conforming its argument to the facts, the petitioner has twisted the facts around a theory and then charges the Circuit Court of Appeals with "a misapprehension of the facts of the case" (petitioner's brief, p. 28), and with remaining in error after the removal of such misapprehension at a conference with MANTON, C. J. (p. 28). The Circuit Court of Appeals was under no misapprehension of facts but upon that assertion by the petitioner's advocate Judge MANTON heard him and the advocate for the libelants (here re-

spondents) and wrote the letter quoted on page 6 of the petitioner's brief. It is preposterous to suppose that the judges of the Circuit Court of Appeals—two of whom sat for years in the District Court—were under any misapprehension as to the facts of this case or as to the form of the stipulation and customary practice in respect to decrees on such stipulations.

Admiralty Rule 8 of the Rules of the District Court for the Southern District of New York, quoted by Judge MANTON (R. 246), prescribes the form of the stipulation—a form which does away with the former requirement of motion for summary judgment against stipulators—and provides in part:

> "Such stipulation shall contain the consent of the stipulators, that if the libellant or petitioner recover, the decree may be entered against them for an amount not exceeding the amount named in such stipulation and that thereupon execution may issue against their goods, chattels, lands, and tenements or other real estate."

The stipulation in the case at bar is in that form (R. 25 A, 25 B). The form of decree cited by opposing counsel in Benedict on Admiralty was entitled in the Eastern District of New York and, as indicated by the footnote thereto, was not entered upon the Southern District form of stipulation.

As far back as 1834 in *The Virgin*, 8 Pet. (33 U. S.) 537, at page 555, we find a form of decree against claimant and stipulators as follows:

> "And this court, further proceeding to render such decree as the circuit court ought to have rendered in the premises, it is further ordered, adjudged and decreed, that the said claimant, Graf,

do forthwith pay into the said circuit court the sum of $1,800, being the amount of the appraised value of the said ship 'Virgin', delivered to him on stipulation, as in the proceedings mentioned, together with interest thereon, at the rate of six per cent, from the 24th day of March, 1824, when the same was delivered to him on stipulation as aforesaid, unto the day when the same sum shall be so paid into the circuit court, together with the costs of the district and circuit courts; and unless he shall do so, within ten days after the said circuit court shall require the same to be done, that execution do issue, in due form of law, upon the stipulation aforesaid, against all the parties thereto. And upon the payment of such sums, then that the claimants, as owners of the said ship 'Virgin', be and hereby are forever exonerated from all other and further payment in the premises. And it is further ordered, adjudged and decreed, that this cause be remanded to the said circuit court, with directions to carry this decree forthwith into effect."

Very appropriate to the case at bar is the language of Judge BENEDICT in *Harriman* v. *The Rockaway Beach Pier Co.*, 8 Fed. 94, bottom page 95:

"This stipulation was without qualification. It was given voluntarily, and not in obedience to any order of the court. It was not necessary to the defense of the cause, nor in any way compelled. By virtue of this stipulation the defendant acquired possession of property then in the possession of the marshal. Under such circumstances, I do not see how it can be open to the stipulators upon that stipulation to say that the court has not acquired jurisdiction to enter a decree upon the stipulation."

Section 8 of the Act, unless it contemplated a nugatory thing, must have intended that a proceeding which begins with the seizure of the property and in which the court retains jurisdiction to enter a decree should end with a decree against the property or against those liable upon the stipulation substituted for the property. Such has been the course of proceedings in the case at bar and the proceeding was ripe for decree, for everything contemplated by Section 8 as precedent to decree had been accomplished.

The filing of the stipulation was the undertaking of a personal liability to which the decree gave effect. The arbitration, which intervened between the stipulation and decree, was a procedural step in the ascertainment of the liability, not a qualification or modification upon that liability. As the arbitration clause was made part of the booking contract, the order, as resettled, directing that such arbitration proceed, referred to the subject-matter of the arbitration as "any and all issues under the contract" etc. (R. 29). The evidence presented on the arbitration related to the performance of the contract and whether such contract was well performed or not turned on the question of the tug's negligence in such performance. In confirming the award and entering a decree, the court reached the judicial conclusion that, in the language of the Circuit Court of Appeals (R. 246): "the liability arbitrated between the parties was a liability that attached to the tug as well as to the owner *in personam.*"

The petitioner's suggestion (petitioner's brief bottom p. 28, top p. 29) that the Circuit Court of Appeals has construed Section 8 of the Act as giving the courts "power to order arbitration in any case *in rem* in admiralty whether any agreement for arbitration exists or not" is a grotesque caricature of the decision below and, if necessary to the petitioner's argument, sufficiently demonstrates how unsound that argument is.

POINT VIII.

The objection that the award was not signed by all the arbitrators is insubstantial, was not taken in the District Court and was not assigned as error.

The Act of Congress is a validating statute rendering arbitration agreements enforceable and makes no distinction between agreements requiring unanimity on the part of the arbitrators and agreements not requiring it. The Act contains no provision requiring unanimity where, as here, the arbitration agreement does not require it. The petitioner's suggestion that there is some sort of presumption that the Act contemplated unanimity of action on the part of the arbitrators is not recognizable in the provisions made for majority action in the procedure authorized by Section 7 of the Act in respect to witnesses. Under that section "the arbitrators * * * or a majority of them, may summon in writing any person to attend" etc. "Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them," and in case of refusal to obey the summons "the United States Court in and for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons" etc. Since, therefore, the arbitrators may proceed by majority action in compelling the attendance of witnesses, it is hardly reasonable to suppose that they may not make their decision by majority action.

The statement in the petitioner's brief (p. 29) that "the Arbitration Act of the State of New York, which we understand was largely followed in the preparation of the Federal Act, does contain a provision that a majority of the arbitrators may make an award" is somewhat misleading as the provision mentioned does not appear (except by cross-reference) in the Arbitration Law, Chapter 72 of the Consolidated Laws of the State of New

York, but is to be found in Section 1453 of the Civil Practice Act whereby "an award by a majority of them is valid unless the concurrence of all is expressly required in the submission". That clause appeared in the same terms in Section 2371 of the old Code of Civil Procedure which in turn derived it, without change of wording, from the now more than one hundred years old Revised Statutes of the State of New York, Part III, Title XIV, "Of Arbitrations", Section 7, which appears at the top of page 542 of the second volume of the first edition (The Revised Statutes of New York dealt with submission of existing disputes to arbitration, a judgment of a designated court to be rendered on the award, as distinguished from agreements to arbitrate future controversies). There is only a partial correspondence between the Federal and the New York Statutes and no room for the suggestion of a variance to be explained, amid close correspondences, only by a difference of intent in giving judicial enforceability to agreements. For the arbitration of future controversies in interstate or foreign commerce or in matters within the admiralty jurisdiction Congress was not (like the Revised Statutes of New York in making provision for the enforcement of awards on the actual submission of preexisting controversies) codifying, with variances required to be expressed, an existing procedure but was striking out on a new line. Its legislation is self-sufficient and unimpeded by any common law disabilities. The true principle is that restrictions upon its legislation, not appearing therein, were not intended thereby.

The arbitration was to take place before the Grain Committee of the New York Produce Exchange and the Committee made its award, signed by four of its five members. It is common knowledge that committees act by a majority vote. The objection now urged was not taken in the affidavits in opposition to the motion to confirm the award (R. 175-183) when, if taken, that objec-

tion could have been met by evidence of the rules under which the Committee acts. The objection, if it had any substance, was, therefore, waived.

As the New York Court of Appeals said in *Matter of S. A. Wenger & Co., Inc.* v. *Propper Silk Hosiery Mills, Inc.*, 239 N. Y. 199, 202:

> "The contract provides: 'Sales governed by Raw Silk Rules & Regulations of the Silk Association of America.' The record does not set forth the rules. They are, however, a part of the contract. They confer rights upon both parties."

Furthermore, neither the original nor the additional assignments of error (R. 229-234) made the point so that it is not matter for consideration in review of the decision below.

CONCLUSION.

The decision of the Circuit Court of Appeals affirming the decretal order of the District Court should be affirmed by this Court.

Respectfully submitted,

OTTO & LYON,
Proctors for Respondents,
By GEORGE V. A. MCCLOSKEY,
Counsel.

APPENDIX

The United States Arbitration Act, 43 Stat. at L. 883.

CHAP. 213.—An Act to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Sec. 2. That a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an

existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Sec. 3. That if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Sec. 4. That a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement: *Provided,* That the hearing and proceedings under such agreement shall be within the dis-

trict in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Sec. 5. That if in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and

effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Sec. 6. That any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Sec. 7. That the arbitrators selected either as prescribed in this Act or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States court in and for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner now provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Sec. 8. That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding here-

under by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Sec. 9. If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in the next two sections. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Sec. 10. That in either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Sec. 11. That in either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Sec. 12. That notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Sec. 13. That the party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Sec. 14. That this Act may be referred to as "The United States Arbitration Act."

Sec. 15. That all Acts and parts of Acts inconsistent with this Act are hereby repealed, and this Act shall take effect on and after the 1st day of January next after its enactment, but shall not apply to contracts made prior to the taking effect of this Act.

Approved, February 12, 1925.